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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LOPEZ,

Defendant and Appellant.

H045177

(Santa Clara County

Super. Ct. Nos. C1628862, C1523594)

Defendant David Lopez pleaded no contest to first degree robbery and admitted he personally used a firearm in the commission of the offense. (Pen. Code, §§ 211, 212.5, subd. (a), 12022.53, subd. (b).)¹ The trial court imposed a total term of eight years in state prison, including four years for the firearm enhancement.

Lopez contends we must remand to the trial court for resentencing because, after the trial court imposed the above sentence, the Legislature amended section 12022.53 to grant trial courts the discretion to strike or dismiss firearm enhancements. He argues that the amendment applies retroactively to his case under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). The Attorney General contends this claim is not cognizable because the trial court did not grant a certificate of probable cause under section 1237.5.

As set forth below, we conclude Lopez is entitled to retroactive application of the newly amended section 12022.53. We further conclude this claim is cognizable

¹ Subsequent undesignated statutory references are to the Penal Code.

notwithstanding the absence of any certificate of probable cause for the reasons set forth in *People v. Hurlic* (2018) 25 Cal.App.5th 50 (*Hurlic*) and *People v. Baldivia* (2018) 28 Cal.App.5th 1071 (*Baldivia*). We will reverse the judgment and remand the matter for the trial court to consider whether to strike the firearm enhancement.

I. BACKGROUND

In August 2015, Lopez and an accomplice used a pistol to rob and pistol whip Michael Martinez at his residence in San Jose. The specific facts of the offense are immaterial to this appeal.

The prosecution charged Lopez by information with six counts: Count 1—first degree robbery (§§ 211, 212.5, subd. (a)); count 2—assault with a deadly weapon (§ 245, subd. (a)(1)); count 3—first degree burglary (§§ 459, 460, subd. (a)); count 4—false imprisonment (§§ 236, 237); count 5—kidnapping for ransom (§ 209, subd. (a)); and count 6—kidnapping to commit robbery (§ 209, subd. (b)(1)). The information further alleged numerous enhancements. As relevant here, the information alleged Lopez personally used in a handgun in the commission of counts 1 and 3. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) The information further alleged Lopez had served a prior prison term. (§ 667.5, subd. (b).)

Under a plea agreement, Lopez pleaded no contest to count 1 and admitted the allegations in exchange for a sentence of eight years in state prison. The trial court imposed the agreed-upon term of eight years, consisting of four years for count 1 consecutive to four years for the firearm enhancement. The court struck the term for the prior prison term and dismissed the remaining counts.²

² In an unrelated matter, case No. C1523594, the court imposed a concurrent term of two years for theft of a vehicle with a prior conviction. (Veh. Code, § 10851, subd. (a); § 666.5.)

In September 2017, Lopez timely filed a notice of appeal and requested a certificate of probable cause setting forth claims of ineffective assistance, prosecutorial misconduct, and other claims not at issue here. The trial court denied the certificate.

II. DISCUSSION

Lopez contends we must remand to the trial court for resentencing because, after the trial court imposed the above sentence, the Legislature amended section 12022.53 to grant trial courts the discretion to strike or dismiss firearm enhancements. He contends this change in law must be applied to his case under the retroactivity doctrine of *Estrada*, *supra*, and its progeny. The Attorney General contends the appeal is not cognizable because Lopez failed to obtain a certificate of probable cause. The Attorney General further argues that reaching the claim would deprive the prosecution the benefit of its plea bargain with Lopez. For the reasons below, we conclude the legislative amendment applies retroactively under *Estrada*. Furthermore, we conclude Lopez may raise his claim here notwithstanding the absence of a certificate of probable cause.

A. Retroactivity of the Legislative Amendment

At the time of sentencing, section 12022.53, subdivision (h) provided, “Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.” (Former § 12022.53, subd. (h); see Stats. 2010, ch. 711, § 5.) Section 12022.53 was amended effective January 1, 2018, and subdivision (h) now provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 2.)

Under the retroactivity principles of *Estrada* and its progeny, this change in law applies retroactively to Lopez’s sentence, which is not yet final. The California Supreme Court held in *Estrada* that “[w]hen the Legislature amends a statute so as to lessen the

punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.” (*Estrada, supra*, 63 Cal.2d at p. 745.) This exception applies when a statutory amendment gives the trial court discretion to impose a lower sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-78.) We conclude the amendment requires us to reverse the judgment and remand the matter to allow the trial court to consider whether to strike the section 12022.53, subdivision (b) enhancement allegations under section 1385.

B. No Certificate of Probable Cause is Required

The Attorney General contends Lopez’s claim is not cognizable without a certificate of probable cause under section 1237.5 (precluding appeals after a plea of no contest or guilty unless the trial court has granted a certificate of probable cause). Lopez claims no certificate is required for the reasons set forth in *Hurlic, supra*, 25 Cal.App.5th 50.

In *Hurlic*, the court of appeal considered a claim identical to that raised by Lopez here. Hurlic had entered a plea agreement including a term for an admitted firearm enhancement, but on appeal he sought remand for resentencing under the legislative amendment to section 12022.53. The trial court had not issued a certificate of probable cause. The court of appeal held that no certificate of probable cause is required when a defendant challenges an agreed-upon sentence based on a legislative amendment that retroactively grants a trial court the discretion to waive a sentencing enhancement. (*Hurlic, supra*, 25 Cal.App.5th at p. 53.) Under the logic of *Hurlic*, Lopez is also entitled to retroactive application of the amended section 12022.53.

The Attorney General contends *Hurlic* is distinguishable because the defendant in that case filled out his notice of appeal by stating he wished to “avail himself of ‘the new Senate Bill 620’ ” *Hurlic, supra*, 25 Cal.App.5th at page 54, whereas Lopez sought a certificate of probable cause based on ineffective assistance of counsel. The asserted distinction is irrelevant. The Attorney General further contends *Hurlic* is poorly reasoned, and that reaching the claim on appeal would deprive the prosecution of the benefit of the plea bargain. This Court has rejected those arguments and adopted the reasoning of *Hurlic*: “Hurlic’s appeal was indisputably meritorious, and no defendant could possibly obtain a certificate to make a challenge based on a law that did not exist at the time of sentencing.” (*Baldivia, supra*, 28 Cal.App.5th at p. 1077.) “If the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements. It follows that defendant’s appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause.” (*Id.* at p. 1079.) The same reasoning applies here.

For the reasons above, we conclude Lopez’s claim is cognizable on appeal, and he is entitled to retroactive application of the amended section 12022.53. Accordingly, we will reverse the judgment and remand to the trial court for reconsideration of whether to strike the firearm enhancement.

III. DISPOSITION

The judgment is reversed and the matter is remanded for the purpose of allowing the trial court to consider whether to strike the Penal Code section 12022.53 enhancement under Penal Code section 1385. If the trial court strikes the Penal Code section 12022.53 enhancement, it shall resentence Lopez. If the trial court does not strike the Penal Code section 12022.53 enhancement, it shall reinstate the sentence.

Greenwood, P.J.

WE CONCUR:

Elia, J.

Grover, J.

People v. Lopez
No. H045177